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ABSTRACT

This report serves as an overview of intellectual property law, policies, and practices as they relate to distance learning. It seeks to provide background information and direction for the Florida Distance Learning Network and the Postsecondary Education Planning Commission's Task Force on Telecommunications. Several of the technologies used in distance education are explained. Copyright law in the educational system, and the distance learning environment in particular, is also explored, with a discussion of relevant legal parameters at both the federal and state levels. The differences between copyrighted works of third parties and copyrighted works of faculty and staff are highlighted, along with some funding and policy issues. The report concludes that emerging technologies aggravate long-standing debate about intellectual property and fair use; therefore, the Florida Distance Learning Network should create two subcommittees--one devoted to addressing intellectual property issues in distance learning, and the other to address problems of disposition of revenue resulting from the licensing of distance learning courseware. It is also recommended that in light of the lack of any standardized policy, K-12 school districts should be given the same statutory authority as colleges and universities to create policy and to effect intellectual property agreements with faculty and staff. A list of interviews is appended. (BEW)

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An Overview of Intellectual Property Issues Associated with Distance Learning in Florida

The Florida Legislature
Joint Committee on Information Technology Resources
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EXECUTIVE SUMMARY

INTRODUCTION

This report provides an overview of the intellectual property law, policies, and practices as they relate to distance learning. Its purpose is to provide some background information and direction for the Florida Distance Learning Network and the Postsecondary Education Planning Commission's Task Force on Telecommunications to pursue in their respective further deliberations in this complex area. In a few instances, where warranted, specific recommendations are made.

FINDINGS

A. DISTANCE LEARNING TECHNOLOGIES

Distance learning enables a person to use technology to overcome the barriers of distance or location and time in accessing information. Although correspondence courses and mailed videotapes have long been used to provide distance learning, the following technologies, either alone or in combination with one another, are used to transmit distance learning information in real-time:

(1) satellite;
(2) fiber optics;
(3) cable;
(4) microwave/instructional fixed service (ITFS);
(5) digital compression; and,
(6) computer networks.

B. OVERVIEW OF COPYRIGHT LAW

Copyright law is governed by the U.S. Copyright Act. "Original works of authorship" automatically receive copyright protection as soon as they are "fixed in any tangible medium of expression, now known or later developed."

The copyright owner has the exclusive right to reproduce, distribute, and publicly perform or display the copyrighted work, as well as the exclusive right to prepare derivative works. Any of these exclusive rights, or their subdivisions, may be transferred and owned by separate individuals.

A major limitation on the copyright owner's exclusive right is the doctrine of fair use. The U.S. Copyright Act provides that "the fair use of a copyrighted work, including use by reproduction in copies . . . for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

The Copyright Act provides for an additional limitation on exclusive rights in a copyrighted work by granting an exemption for certain performances and displays. One such exemption from infringement is extended to instructors or pupils who perform or display a work "in the course of face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction."

C. Federal Review of Copyright Law

Because of the novel intellectual property concerns engendered by the rapid growth of new technologies, the federal Information Infrastructure Task Force (IITF) created a Working Group on Intellectual Property Rights to examine the intellectual property implications of the National Information Infrastructure (NII). The Working Group released a report in September 1995 and is continuing to sponsor a conference on the development of new fair use guidelines.

Although as yet undetermined, it seems unlikely that the fair use doctrine will be extended to provide protection from copyright infringement to educational institutions involved in distance learning. The current fair use guidelines were assembled with face-to-face teaching environments in mind; the expansion of the guidelines to encompass out-of-building teaching would seem to run contrary to publishing and authorial interests. Whatever changes in the federal copyright law may occur would preempt state law in this area.

D. Copyright Policies in the Florida Educational System

1. Copyrighted Works of Third Parties

When dealing with copyrighted books and periodicals, the copyright policies of Florida's educational institutions, and those of other states and the federal government, adhere to the fair use guidelines. The guidelines allow the distribution of multiple copies made by or for the teacher giving a course, as long as a copyright notice is included and certain tests of brevity and spontaneity are met. The copies must also meet a "cumulative effect test," which means that the copying is "for only one course in the school in which the copies are made." In addition, the guidelines prohibit repeated copying "with respect to the same item by the same teacher from term to term."

However, while adhering to the fair use guidelines for photocopying, many Florida educational institutions which are involved in distance learning have obtained permission or license agreements through a copyright clearinghouse office within the institution or via local counsel. In certain instances, licensure is obtained collectively.

Because there is a duplication of effort when individual institutions obtain separate licenses for the same material, the wisdom of decentralized mechanisms for procuring such rights has come into question. One Florida expert in copyright issues in the K-12 education system has argued that Florida needs "a new concept of licensure whereby all licenses for distance learning materials would be negotiated on a state-wide basis." Such a licensing scheme would be similar to the state's videotape library. The natural entity for implementing a statewide licensure system is the newly created Florida Distance Learning Network (FDLN).

Institutions throughout Florida's educational system have by and large become comfortable with a decentralized arrangement for obtaining copyright permission for distance learning material. Indeed, this seems to be the standard procedure for other states involved in distance learning. Still, the need to obtain permission for the multiple copyrighted works often involved in a distance learning situation may require a more articulated and uniform policy than is otherwise in place.

2. Copyrighted Works of Faculty and Staff

(a) Universities and Community Colleges

Florida's universities and community colleges are authorized by statute to enter into intellectual property agreements with their employees on any employee's work product. Telecourses in both the community college and state university systems have generally not been treated as creating intellectual property rights for faculty or staff who participate in their development or delivery. Instead, the Board of Regents-United Faculty of Florida Collective

Bargaining Agreement provides that any work created with university support becomes the property of the university. Each university then provides for faculty compensation. Similar policies are in effect in the community college system.

(b) The K-12 System

Unlike the state university system and the community colleges, Florida's K-12 school districts do not have express statutory authority to enter into intellectual property agreements with faculty and staff. In the few instances where school districts have had to enter into intellectual property agreements, they have used the statutory copyright authority granted to the Department of Education (DOE).

The creation of copyrighted works by K-12 faculty is perhaps of the greatest concern simply because there is no standardized policy in place for dealing with such a situation. There is, then, the possibility for teachers to individually copyright course materials and retain full royalties, potentially depriving Florida's educational system of revenue streams to which it would otherwise be entitled if the school district retained the copyright.

The DOE Office of the General Counsel has in the past effected copyright arrangements for school districts. Yet, it would seem to strain their resources, if not be simply impracticable, to expect the DOE to handle the potential copyright arrangements of all of the school districts across the state.

E. Related Funding and Policy Issues

Nearly every distance learning activity leads to questions related to intellectual property. In much the same manner that distance learning

technologies know no school district boundaries, these issues cut across the lines of Florida's multi-level educational system, raising thorny political and public policy questions as to coordination and centralization.

Because revenue streams are generated through royalties when a distance learning institution creates and markets course materials, licensing arrangements can directly affect how, by whom, and to what extent distance learning is implemented across the state. The proprietary nature of school and community college districts about funding and full-time equivalent head counts (FTEs) also puts a damper on other efforts to implement distance learning on a widely-utilized scale.

CONCLUSIONS AND RECOMMENDATIONS

Based on the findings of this report, it is concluded that:

- Although rapidly expanding technologies offer tremendous opportunities to improve teaching and learning and expand access for place and time-bound students, the technologies also aggravate long-standing issues, some related to intellectual property, in education.

- The intellectual property issues related to distance learning are complex, affect some basic assumptions and practices in the education system, and are still unsettled, partly due to the current federal review of the copyright law and its associated "fair use" doctrine. There needs to be an ongoing forum for reviewing these issues and their impact on distance learning in Florida and formulating recommendations to the Legislature.

Therefore, it is recommended that:

1. The Florida Distance Learning Network create a sub-committee devoted to addressing intellectual property issues associated with distance learning. The Board of Regents, the State Board of Community Colleges, and the Division of Public Schools should submit recommendations to the Florida Distance Learning Network to assist the sub-committee in identifying and developing recommendations on all related intellectual property issues, such as effective negotiating and contracting strategies and policies for obtaining statewide licenses of copyrighted materials, and equitable arrangements for copyright interests in materials developed by Florida teachers. The sub-committee should also be responsible for staying abreast with the ongoing federal review of the copyright law and any proposed changes, and with advising distance learning providers on copyright procedures and licensing arrangements to properly manage the state's distance learning system.

2. The Florida Distance Learning Network create a sub-committee devoted to addressing the funding issues associated with the disposition of revenues resulting from the licensing of distance learning courseware and related products. The Board of Regents, the State Board of Community Colleges, and the Division of Public Schools should submit recommendations to the Florida Distance Learning Network to assist the sub-committee in its formulation of policy in this area.

Based on the findings in this report, it is also concluded that:

• Because there is no standardized policy for intellectual property agreements between teachers and institutions at the K-12 level, the State's financial interests may be at risk.

Therefore, it is recommended that:

3. The Legislature amend the law to expressly grant school districts the same statutory authority as universities and community colleges to effect intellectual property agreements with their teachers and require the school districts to adopt guidelines in this area.

I. Introduction

Purpose

This report is in response to two separate, but related, activities. First, proviso language in the 1994 General Appropriations Act directed the Postsecondary Education Planning Commission, in cooperation with the Commissioner of Education, to recommend a clear, comprehensive telecommunications policy that focuses the State's technological resources on the accomplishment of specific educational goals. The proviso language further directed the establishment of a task force to accomplish that purpose. The preliminary task force report, dated February 1995, requested that the Joint Committee on Information Technology Resources assist in examining the issues associated with intellectual property rights related to distance learning, and in providing alternatives for consideration.

Second, and subsequent to the task force report, the 1995 Legislature passed legislation (Chapter 95-403, Laws of Florida) establishing the Florida Distance Learning Network. One of the many duties assigned to the Florida Distance Learning Network is to . . . "recommend to the Legislature policy regarding distance learning program funding and the protection of intellectual property rights."

This report provides an overview of the intellectual property law, policies, and practices as they relate to distance learning. Its purpose is to provide some background information and direction for the Florida Distance Learning Network and the Postsecondary Education Planning Commission's Task Force on Telecommunications to pursue in their respective further deliberations in this complex area.

Scope

The program content for a distance learning program is either acquired from a third party through a licensing agreement, or is created and may subsequently be copyrighted and marketed. This report addresses two major issues which arise when considering the effect of distance learning on intellectual property rights:

(1) whether the current procedures employed by individual institutions for obtaining copyright permission or licenses are effective in a statewide distance learning system; and,

(2) whether there are adequate policies concerning copyrightable material developed by faculty for use in a distance learning environment.

Both of these issues generate additional sub-issues when analyzed in light of both the differences among the three levels of Florida's educational system and the multiplicity of distance learning technologies.

Since intellectual property issues arise in nearly every decision regarding distance learning, it is beyond the scope of this report to delineate all of the issues to be encountered. Indeed, as Florida pursues implementing distance learning on a broader scale, new intellectual property issues will likely arise that may not have been contemplated. This report provides an overview of intellectual property issues in the context of distance learning, and provides some examples of unresolved issues. In a few instances, where warranted, specific recommendations are made.

Methodology

To prepare this report, legal research on the topic of copyright law was conducted, as well as a general literature review on the topic of distance learning. In addition, in-person and telephone interviews were conducted with individuals knowledgeable about distance learning, representing the K-12 public schools, community colleges, and state universities. (See Appendix A.) A draft copy of this report was distributed for review to many of the interviewees, as well as other knowledgeable individuals. Their comments were incorporated into this final report, as appropriate.

Organization of Report

This report consists of three sections, including this first introductory section. Section II contains the findings concerning distance learning technologies, copyright law issues, and specific practices in Florida regarding intellectual property issues associated with distance learning. Section III contains the report's conclusions and recommendations.

II. FINDINGS

A. Distance Learning Technologies

The term "distance learning" has been attached to a wide variety of different technologies that "bring teaching and learning together through the transmission of information or expertise from one location or time period to another."[1] Distance learning enables a person to use technology to overcome the barriers of distance or location and time in accessing information.

Because teaching and learning occur in separate time periods or geographic locations in a distance learning system, "special techniques of course design are required, as well as special instructional techniques and special methods of communication by electronic and other media."[2] The use of distance learning technology involves either one-way or two-way transmission of voice, video, or data, or any combination of the three.[3]

Although correspondence courses and mailed videotapes have long been used to provide distance learning, the following technologies, either alone or in combination with one another, are used to transmit distance learning information in real-time:

(1) satellite;
(2) fiber optics;
(3) cable;
(4) microwave/instructional fixed service (ITFS);
(5) digital compression; and,

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1 Florida Remote Learning Service, Distance Learning in Florida 3 (1995) [hereinafter FRLS].

2 Florida Board of Regents, A System-wide Approach to Distance Learning in Florida: An Addendum of the State University System Master Plan 1993-98 2 (1995) [hereinafter BOR Report].

3 FRLS, *supra* note 1, at 3.

(6) computer networks.[4]

The bulk of distance learning in the United States currently takes place via satellite distribution.[5] The majority of distance instruction delivered by Florida public educational institutions is currently provided primarily through videotape, compressed video with one or two-way audio feedback, and ITFS.

While satellite distribution is usually employed for one-way video transmissions, it is also capable of incorporating teleconferencing technology to provide two-way voice communication.[6] Florida currently owns a transponder on the Telstar satellite, which is managed by the Department of Management Services (DMS). Short-term plans for the satellite consist primarily of video programming, although long-term plans envisage satellite uplinks at an increasing number of locations. These long-term plans would allow individual institutions to transmit information on their own.[7]

Although some believe satellite distribution to be the future for distance learning involving video, both cable and ITFS are still widely used by educational institutions in Florida. ITFS is a low-power, microwave narrowcasting system that has a reach of 30-50 miles. A typical ITFS distance learning program is the Board of Regents Florida Engineering Education Delivery System (FEEDS) used at multiple universities. Students at branch campuses of the university system, or other remote locations, receive live, televised instruction using ITFS and two-way

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4 *Id.* at 3-5.

5 *Id.* at 3.

6 *Id.*

7 Interview with Bill Schmid, Director of the Florida Instructional Resource Network, in Tallahassee, Fla. (July 6, 1995) [hereinafter Schmid]; interview with Mary Anne Havriluk, Director of the Florida Remote Learning Service, Tallahassee, Fla. (July 20, 1995) [hereinafter Havriluk].

audio technology.[8]

When cable is used in distance learning, it is typically through a local Public Broadcasting Service channel. Institutions use telecourses either licensed from distributors, or developed by the institution itself.[9] Currently, cable lacks the interactive capability of ITFS systems such as FEEDS, the system through which graduate engineering courses are offered via distance learning delivery by nine state universities. Thus cable does not allow students to ask an instructor questions; however, cable has the obvious advantage of allowing a student to remain at home. Eventually, with the development of digital video technologies, cable will provide the student with an interactive distance learning environment at home.[10]

Computer networks are also becoming an increasingly popular tool for distance learning. The Florida Information Resource Network (the state's education telecommunications network) provides a vast array of educational services, including instructional resources such as lesson plans and course materials.[11] For example, the CNN Newsroom Guide and Newsweek On-Line are available to Florida teachers through the network. A new directory titled "Distance Learning" is also included on the Florida Information Resource Network's instructional resources menu. It directs users to other Internet sites throughout the world that have an Internet homepage concerning distance

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8 *Bridging the Distance*, USF MAGAZINE, Summer 1995, at 4.

9 Telephone interview with Kathy Clower, Director of Telecommunications, Florida Community College of Jacksonville (Sept. 1, 1995) [hereinafter Clower].

10 *See* FRLS, *supra* note 1, at 4.

11 *See* HTTP://WWW.FIRN.EDU/INSTRUCT.HTML.

learning opportunities and information.

The Florida Information Resource Network is also used for the K-12 Hospital Homebound program as a way to continue children's education when they are physically unable to attend school for long periods of time. Course materials, research materials, tests, and pa.ent-teacher conferencing are all available through the telecommunications network.

With the recent advent of the Internet's World-Wide Web, which provides a user-friendly "point-and-click" interface to the Internet, and incorporates text, sound, and graphics, a large number of Florida schools have also developed a presence on the Internet with their own home pages. For example, students at American High School in Dade County regularly use the World-Wide Web in classrooms. That school has mounted at least three "major multimedia projects" on its home page: Hurricane Andrew; the Miami Metro Zoo, and the Holocaust.[12] Students at American High School also learned geography lessons by conferencing over the Internet with other students in Japan, Germany, Spain and England.[13]

B. Overview of Copyright Law

Copyright law is governed by the U.S. Copyright Act.[14] "Original works of authorship" automatically receive copyright protection as soon as they are "fixed

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12 *See* Robert Sanchez, *A Wired Education*, INTERNET WORLD, October 1995, at 72. American High School's Web site is located at HTTP://DCPS/DADE/K12/FL/US.

13 *Id.*

14 17 U.S.C. §§ 101-1010 (1994).

in any tangible medium of expression, now known or later developed."[15] A work created by an individual enjoys copyright protection for the life of the author plus fifty years.[16] A work created by an individual for others, known as work for hire,[17] receives protection for a term of 100 years from the year of creation or seventy-five years from the year of publication, whichever expires first.[18]

The copyright owner has the exclusive right to reproduce, distribute, and publicly perform or display the copyrighted work, as well as the exclusive right to prepare derivative works.[19] Any of these exclusive rights, or their subdivisions, may be transferred and owned by separate individuals.[20] In addition, the copyright ownership itself can be transferred either in whole or in part.[21]

A major limitation on the copyright owner's exclusive right is the doctrine

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15 *Id.* § 102(a).

16 *Id.* § 302(a).

17 A "work made for hire" is—

> (1) a work prepared by an employee within the scope of his or her employment; or
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> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Id. § 101.

18 *Id.* § 302(c).

19 *Id.* § 106

20 *Id.* § 201(d)(2).

21 *Id.* § 201(d)(1).

of fair use.[22] The U.S. Copyright Act provides that "the fair use of a copyrighted work, including use by reproduction in copies . . . for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[23] Determining what constitutes fair use in a particular case entails consideration of four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and,

(4) the effect of the use upon the potential market for, or value of, the copyrighted work.[24]

The Copyright Act provides for an additional limitation on exclusive rights in a copyrighted work by granting an exemption for certain performances and displays.[25] One such exemption from infringement is extended to instructors or pupils who perform or display a work "in the course of face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction."[26] However, this exemption specifically precludes using a copy of a motion picture or audiovisual work "that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made."[27]

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22 *See id.* § 107.
23 *Id.*
24 *Id.*
25 *Id.* § 110.
26 *Id.*
27 *Id.*

C. FEDERAL REVIEW OF COPYRIGHT LAW

Because of the novel intellectual property concerns engendered by the rapid growth of new technologies, the federal Information Infrastructure Task Force (IITF) created a Working Group on Intellectual Property Rights to examine the intellectual property implications of the National Information Infrastructure (NII).[28] The Working Group released its report, which is referred to as the "White Paper," in September 1995.

Copyright law as applied to distance learning is still unsettled. It is hoped that the reassessment by the federal Information Infrastructure Task Force will settle the uncertainty surrounding the fair use doctrine. Although as yet undetermined, it seems unlikely, based on the "White Paper," that the fair use doctrine will be extended to provide protection from copyright infringement to educational institutions involved in distance learning.[29] The current fair use guidelines were assembled with face-to-face teaching environments in mind; the expansion of the guidelines to encompass out-of-building teaching would seem to run contrary to publishing and authorial interests.

In an effort to clarify the unsettled issues concerning the fair use doctrine, the Working Group has also been sponsoring a conference on the development of new fair use guidelines, which has met regularly since September 1994.[30] The new guidelines for multimedia, library preservation, browsing and distance

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28 *See* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 1 (1995) [hereinafter White Paper).

29 *Id.* at 84.

30 *Id.* at 83.

learning are anticipated to be formalized by the end of 1995.[31]

Some participants in the Conference on Fair Use have suggested that "the United States is divided into a nation of information 'haves' and 'have nots.' "[32] Those participants are of the opinion that the fair use defense should be broadly generous in the NII context to allow for equal opportunity to access information.[33] However, the Working Group "rejects the notion that copyright owners should be taxed, apart from all others, to facilitate the legitimate goal of "universal access."[34] If appropriate guidelines are not agreed on by the conference participants, the Working Group may conclude that regulatory or legislative action in the area of fair use is necessary.[35] Any federal legislative changes in this area would preempt state law.

Another issue affecting distance learning is the categorization of a multimedia work into one of the categories enumerated by the Copyright Act.[36] Even though the Copyright Act does not contain a category for "multimedia works," the IITF White Paper points out that these types of works, (which would seem to comprise the bulk of both current and future distance learning materials) may, in many instances, be considered audiovisual works.[37] Audiovisual works are currently excluded from fair use; the only explicit exemption educators have

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31 *Id.*

32 *Id.* at 84.

33 *Id.*

34 *Id.*

35 *Id.*

36 Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion picture and other audiovisual works; (7) sound recording; and (8) architectural works. 17 U.S.C. § 102 (1994).

37 *Id.* at 44.

for audiovisual works under the Copyright Act is when teaching face-to-face.[38]

The IITF White Paper also states that works which do not fit into any of the categories specified by the Copyright Act may still be protected, but are, "in a sense, in a copyright no-man's land."[39] Further, this report reveals that "categorization may no longer be useful or necessary" with the increasing "cross breeding" of types of works and the difficulty in finding a category for multimedia works.[40] Although the "Working Group does not recommend at this time the consolidation or elimination of categories (and harmonization of the differing application of rights and limitations on those rights), it is likely that such consolidation or elimination will be appropriate in the future."[41]

Distance learning providers are thus well advised to undertake copyright audits to "determine which materials they will incorporate into their programs, which rights have been secured, and, most importantly, which rights remain to be secured."[42] As the IITF White Paper reveals, "it may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine."[43]

In direct response to the IITF White Paper, several bills have been introduced in Congress. Senate Bill 1284, sponsored by Senators Orrin Hatch and

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38 Telephone interview with Gary Becker, Director of Instructional Media and Technology Services, Seminole County School District, August 17, 1995 [hereinafter Becker]. *See also* 17 U.S.C. § 110 (1994).

39 White Paper, *supra* note 28, at 42-43.

40 *Id.* at 45.

41 *Id.*

42 Kenneth D. Salomon, *A Primer on Distance Learning and Intellectual Property Issues*, 96 ED. LAW REP. 305, 313 (1995) [hereinafter *Primer on Distance Learning*].

43 White Paper, *supra* note 28, at 82.

Pat Leahy,[44] is a bill which is strongly influenced by the IITF White Paper. This bill entitled, "Information Infrastructure Copyright Act of 1995" and introduced in September, deals with digital transmission of copyrighted works and imposes criminal sanctions for copyright infringement.[45] This bill would allow a violator to be fined up to half a million dollars, imprisoned for five years, or both.[46] In addition, Senate Bill 1122, sponsored by Senators Leahy and Feingold, was introduced in August.[47] This bill is entitled "Criminal Copyright Improvement Act of 1995," and adds further changes to the existing intellectual property law. This bill would hold system operators, whose systems are used for software piracy by customers, criminally liable.[48]

Although the introduction of these bills reflects a measure of Congressional support of the IITF White Paper recommendations, there is substantial criticism of these proposed changes.[49] The IITF White Paper recommendations have been labeled by some critics as unrealistic, "biased against the public interest and toward media centralization," and "a failure to uphold the public's fair use rights."[50] Some critics say that Senate Bill 1284 "panders to large-scale copyright holders, and fails to balance their rights with those of authors & creators, not to

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44 S. 1284, 104th Cong., 1st Sess. (1995).

45 *Id.*

46 *Id.*

47 S. 1122, 104th Cong., 1st Sess. (1995).

48 Electronic Frontier Foundation, "IPWG Report's Suggested Legislation: Passed and Pending (+ Canada Tie-In)," EEFector Online 8.18 (1995): n. pag., online, EFFector Newsletter Archive, Internet, 6 Nov. 1995.

49 Electronic Frontier Foundation, "Commerce Dept. IPWG Report on Online Intellectual Property Meets Resistance," EFFector Online 8.18 (1995): n. pag., online EFFector Newsletter Archive, Internet, 6 Nov. 1995.

50 Electronic Frontier Foundation, "IPWG Report's Suggested Legislation: Passed and Pending (+ Canada Tie-In), *supra* note 48.

mention the public's right of fair use."[51] Further, other critics are of the opinion that the bill would hinder "the development of tele-education and general market innovation."[52]

D. COPYRIGHT POLICIES IN THE FLORIDA EDUCATIONAL SYSTEM

1. Copyrighted Works of Third Parties

When dealing with copyrighted books and periodicals, the copyright policies of Florida's educational institutions (and those of other states and the federal government) adhere to the fair use guidelines. These guidelines were recommended by an ad hoc committee of educators, authors, and publishers, and adopted as part of the federal Copyright Act of 1978.[53] In 1981, the guidelines were amended by Congress to include works on video.[54]

The guidelines allow the distribution of multiple copies made by or for the teacher giving a course, as long as a copyright notice is included and certain tests of brevity and spontaneity are met.[55] The copies must also meet a "cumulative effect test," which means that the copying is "for only one course in the school in which the copies are made."[56] In addition, the guidelines prohibit repeated copying "with respect to the same item by the same teacher from term to term."

However, while adhering to the fair use guidelines for photocopying, many

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51 *Id.*

52 *Id.*

53 *See* Mark L. Merickel, *The Educator's Guide to Fair Use of Copyrighted Works*, 51 ED. LAW REP. 711, 715-17 (1989).

54 *A Primer on Distance Learning , supra* note 42, at 309.

55 Merickel, *supra* note 53, at 715 (citing U.S. COPYRIGHT OFFICE, CIRCULAR R21: REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS (1982)).

56 *Id.* at 715-16.

Florida educational institutions which are involved in distance learning have not been inclined—primarily because of the uncertainty surrounding copyright law as it is applied to new technologies—to rely on either the fair use defense or the non-profit educational exemption to protect themselves from claims of copyright infringement. Instead, these institutions have obtained permission or license agreements through a copyright clearinghouse office within the institution or via local counsel.[57] In certain instances, licensure is obtained collectively. For example, the consortium of Florida community colleges purchases the rights to use videotaped telecourses from either the Public Broadcasting System (PBS) or other providers.[58]

(a) *Licensure in a Statewide Distance Learning System*

Because there is a duplication of effort when individual institutions obtain separate licenses for the same material, the wisdom of decentralized mechanisms for procuring such rights has come into question. For example, if the University of Central Florida (UCF) wants to use a distance learning program licensed to the University of South Florida (USF), questions may arise as to whether the USF license extends to usage by UCF. The assumption cannot be made that the license has been granted to the state university system; it might instead be only for the named institution. In addition, at the K-12 level, there are perhaps a number of different school districts wanting to use the same material. Duplicative efforts in obtaining licensing agreements for identical materials,

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57 Interview with Susan Fell, Ass't Director of Distance Learning, Florida State University, Tallahassee, Fla. (Aug. 7, 1995) [hereinafter Fell]; Clower, *supra* note 9.

58 Clower, *supra* note 9.

then, can hardly be called cost-effective. This is why the Florida Information Resource Network (FIRN) negotiates statewide licenses for some research materials, such as the Encyclopedia Brittanica, and then makes these materials available for all students statewide. Some of the licensing agreements negotiated by FIRN are on a per-capita basis; however, FIRN's emphasis lately has been toward negotiating concurrent user-type licenses, which limit the total number of simultaneous users but allow an unlimited number of potential users.

The Florida community colleges' consortium collective selection and licensure of videotaped telecourse materials is another example of pooling needs to achieve cost savings.[59] While the terms of the licensure agreements by the consortium are often on a per-capita basis, there are a number of instances where "volume discounts" in licensure fees are available.[60] Moreover, the consortium's collective arrangement has enabled at least one of its members, Florida Community College at Jacksonville (FCCJ), to market a telecourse in English which it developed.[61]

Gary Becker, Director of Instructional Media and Technology Services for the Seminole County School Board District, and considered an expert in copyright issues in the K-12 education system, has argued that Florida needs "a new concept of licensure whereby all licenses for distance learning materials would be negotiated on a state-wide basis."[62] Such a licensing scheme would be similar to the state's videotape library. Pointing to the cost-effectiveness of such a system,

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59 Clower, *supra* note 9.
60 *Id.*
61 *Id.*
62 Becker, *supra* note 38.

Mr. Becker uses the analogy of textbooks for creating a centralized resource base for educational software which could be put on large-scale file servers.[63] He advocates that Florida should "move into the arena of negotiating [partnerships] to develop a new kind of licensure and distribution."[64] This new licensure model would allow use of combinations of electronic means and state licensure rules for vendors, giving Florida a highly cost-effective and advanced distance learning network.[65] If Florida is going to implement distance learning on a broad scale, Mr. Becker points to the need for a centralized agency to manage resources and thus provide for cost-effective licensure of distance learning materials.[66]

Economic concerns—the sheer cost of giving all of Florida's students wide open access to the vast amount of educational materials distance learning technology provides—are a major impediment to an integrated and widely used distance learning network in Florida.[67] Mr. Becker argues that these economic concerns can be met via a currently-open window of opportunity created by a "scramble" for educational business between the cable and telephone companies.[68] These utilities envision such things as the in-home educational use by students of, *e.g.*, Time-Warner's interactive cable system, realizing that the parents of these students might well be intrigued by the system and might then sign up for the additional services it provides.[69] Because neither cable nor

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63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 Interview with Dr. J. Richard Madaus, Director, College Center for Library Automation, in Tallahassee, Fla. (August 8, 1995).
68 Becker, *supra* note 38.
69 *Id.*

telephone companies have previously sought entry into the education market to any great degree, Florida is in a position to exert leverage upon these utilities through the Florida Public Service Commission.[70] For example, in a joint program between Bell South and the Georgia Public Service Commission, the State of Georgia was able to negotiate a 40-80% rate reduction in phone line costs when telephone lines were brought directly into the classroom.[71]

The natural entity for implementing a statewide licensure system is the newly created Florida Distance Learning Network (FDLN).[72] The law states that "[i]t is the intent of the Legislature to establish a coordinated system for cost-efficient advanced telecommunications services and distance education,"[73] and provides that the FDLN shall have the power to:

> In formal agreement with distance learning providers, acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein.
>
> Do all acts and things necessary or convenient to carry out the powers expressly granted in ss. 364.506-364.514.
>
> In conjunction with distance learning providers, recommend to the Legislature policy regarding distance learning program funding and the protection of intellectual property rights.[74]

However, the statute also declares that:

> Nothing in ss. 364.506-364-514 shall be construed to abrogate, supersede, alter, or amend the powers and duties of any state agency, district school boards, community college boards of

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70 *Id.*
71 *Id.*
72 Ch. 95-403, § 31, 31-36, Laws of Fla. (to be codified at §§ 364.509-.513, Fla. Stat.).
73 *Id.* § 31, at 31, Laws of Fla. (to be codified at § 364.509(1), Fla. Stat.).
74 *Id.* § 31, 34-35, Laws of Fla. (to be codified at § 364.511(1)(g)-(I), Fla. Stat.).

trustees, the State Board of Community Colleges, or the Board of Regents.[75]

Depending on how these two sections are interpreted, this language could be construed as prohibiting FDLN from undertaking statewide licensing arrangements that had hitherto been the province of either individual institutions or the larger components of Florida's educational system.

(b) Copyright Permission in a Statewide Distance Learning System

Institutions throughout Florida's educational system are comfortable with a decentralized arrangement for obtaining copyright permission for distance learning material. Indeed, this seems to be the standard procedure for other states involved in distance learning. For example, in Maine, faculty or staff members are instructed to consult with "the copyright designee at his/her university campus or transmission site for the purpose of obtaining recommendations for audiovisual materials to supplement course content."[76] The copyright designee then identifies and contacts the copyright owner, and obtains copyright permission.[77]

Although individual educational institutions in Florida are left to their own devices as to implementing a system for obtaining copyright permission, the advent of distance learning and its novel array of technologies would seem to suggest the need for a uniform procedure; however, a statewide clearinghouse could not only be bureaucratically unwieldy, but it could meet with substantial

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75 *Id.* § 31, at 35, Laws of Fla. (to be codified at § 364.511(1)(m)(2)-(3), Fla. Stat.).

76 Educational Network of Maine, Instructional Use of Copyrighted Material over ITV, at G-2.

77 *Id.*

resistance from institutions involved in distance learning. Such institutions may feel that, having been able to obtain copyright permission in other circumstances without undue difficulty, they are quite capable of doing so with distance learning materials.[78] Still, the need to obtain permission for the multiple copyrighted works often involved in a distance learning situation may require a more articulated and uniform policy than is otherwise in place. Moreover, the possibility of saddling individual faculty members with such responsibility is of particular concern to faculty unions.[79]

2. Copyrighted Works of Faculty and Staff

(a) Universities and Community Colleges

Florida's universities and community colleges have been authorized by statute, since the late 1960's, to enter into intellectual property agreements with their employees on any employee's work product.[80] The procedure for the

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78 Fell, *supra* note 57.

79 If satellite or video broadcasts among multiple sites necessitate obtaining copyright permissions for protected works, it should be the responsibility of the university to obtain them. Faculty members developing and delivering such courses cannot be expected to use their time for a purpose which is purely a product of the mode of course delivery. *A Union Perspective on Distance Learning*, FIU-UFF NEWSLETTER, October 1994, at 4.

80 FLA. STAT. §§ 240.229, 240.319 (1993).

> . . . [E]ach university is authorized, in its own name, to:
> (1) Perform all things necessary to secure letters of patent, copyright, and trademarks on any work product and to enforce its rights therein. The university shall consider contributions by university personnel in the development of trademarks, copyrights, and patents and shall enter into written contracts with such personnel establishing the interests of the university and such personnel in each trademark, copyright, or patent.

Id. § 240.229.

> Each board of trustees is authorized to develop and produce work products which relate to educational endeavors which are subject to trademark, copyright, or patent statutes. To this end, the board shall consider the relative contribution by the personnel employed in the development of such work products and shall enter into binding agreements with such personnel, organizations, corporations, or government entities, which agreements shall establish the ownership of such trademarks, copyrights, or patents. . . .

Id. § 240.319.

implementation of such agreements in the State University System is established in university administrative rules and policies and the Board of Regents - United Faculty of Florida Collective Bargaining Agreement, consistent with Chapter 240.229, Florida Statutes. That agreement provides that:

> Upon the creation of a work and prior to any publication, the employee shall disclose to the President or representative any work made in the course of university-supported efforts, together with an outline of the project and the conditions under which it was done. . . . [E]mployees need not disclose [work] regarding books, articles, and similar works, the intended purpose of which is to disseminate the results of academic research or scholarly work.
>
> The President or representative shall assess the relative equities of the employee and the university in the work.
>
> Within sixty (60) days after such disclosure, the President or representative will inform the employee whether the university seeks an interest in the work, and a written agreement shall thereafter be negotiated to reflect the interests of both parties, including provisions relating to the equities of the employee and the allocation of proceeds from such work. . . .[81]

Telecourses in both the community college and state university systems have generally not been treated as creating intellectual property rights for faculty or staff who participate in their development or delivery. Instead, the Board of Regents-United Faculty of Florida Collective Bargaining Agreement provides that any work created with university support becomes the property of the university. Each university then provides for faculty compensation.[82] In practice, at the state university level, this has usually translated into a corresponding reduction in the faculty member's traditional workload, with the number of faculty positions

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81 1995-98 BOR-UFF Collective Bargaining Agreement, § 18.3(c)(1)-(3).

82 1995-98 BOR-UFF Collective Bargaining Agreement, § 9.8(c)(4).

remaining the same.[83] For example, the University of South Florida tapes the courses selected by faculty, and reduces the faculty member's workload; in some cases, at the end of the school year, the tapes are erased.[84]

Local boards of community colleges also retain the copyright for distance learning materials produced by faculty. In a unique case of the work-for-hire doctrine, an actor was hired to deliver the telecourse, with the course content developed by the faculty.

Both the Board of Regents and Florida's community colleges, as well as the United Faculty of Florida (UFF), believe the current arrangement for written agreements concerning faculty work product used in distance learning to be adequate.[85] This arrangement, which is apparently not atypical, seems to constitute a balance between faculty rights and the economic concerns of the universities. This arrangement can be characterized as a trade-off between the university, which reduces faculty workload while not increasing faculty positions, and the faculty as a whole, which is given course content control and a yearly opportunity to erase dated/obsolete instructional materials and to "give" the course again. Nevertheless, it is arguable whether the yearly erasure of videotaped telecourses is the best means of implementing distance learning on any sort of broad scale; the repeated use of distance learning materials would seem to be a prerequisite.[86]

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83 Interview with John Opper, Postsecondary Education Planning Commission, in Tallahassee, Fla. (July 10, 1995) [hereinafter Opper]; Clower, *supra* note 9.

84 Opper, *supra* note 83.

85 Interview with James J. Parry, Associate Vice Chancellor, Board of Regents, in Tallahassee, Fla. (July 14, 1995); Clower, *supra* note 9; *Union Perspective*, *supra* note 79.

86 Opper, *supra* note 83.

(b) The K-12 System

Unlike the state university system and the community colleges, Florida's K-12 school districts do not have express statutory authority to enter into intellectual property agreements with faculty and staff. While it is unclear whether the Florida Legislature meant to exclude school districts when it gave copyright authority to the universities and community colleges, the school districts are not precluded by federal or state law from owning copyrights.[87] In the few instances where school districts have had to enter into intellectual property agreements, they have used the statutory copyright authority granted to the Department of Education (DOE). Section 233.255, *Florida Statutes* provides that:

> It is the intent of the Legislature that when educational materials and products are developed by or under the direction of the Department of Education, through research and development or other efforts, including those subject to copyright, patent, or trademark, they shall be made available for use by teachers, students, administrators, and other appropriate persons in the state system of education at the earliest practicable date and in the most economical and efficient manner possible.[88]

The DOE has construed this section as allowing them to own or license materials either developed in-house or through co-development agreements with the private sector.[89] When the Dade County School District received a grant to implement distance learning classes in English as a Second Language (ESOL), the school district entered into a co-development agreement with Josten's

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87 Interview with Charles Ruberg, General Counsel's Office, Department of Education, in Tallahassee, Fla. (July 5, 1995) [hereinafter Ruberg].

88 FLA. STAT. § 233.255(1) (1993).

89 Ruberg, *supra* note 87.

Learning Corporation to develop the curriculum.[90] The district acted as the agent of the DOE for intellectual property purposes.[91] In similar arrangements, proprietary interests in copyright have been quitclaimed to DOE, which then handled licensure and royalty arrangements.[92]

The creation of copyrighted works by K-12 faculty is perhaps of the greatest concern simply because there is no standardized policy in place for dealing with such a situation. Certain school districts, such as Broward County, have the wherewithal to bring in local counsel to effect copyright ownership of materials produced by their teachers.[93] In other districts, teachers are apparently free to copyright on their own such materials as the lesson plans or other work placed on FIRN.[94] The problem with the latter approach, however, is the possibility of teachers independently copyrighting materials and potentially depriving Florida's educational system of revenue streams to which it would otherwise be entitled if the school board owned the copyright.[95]

Because the Internet has dramatically facilitated the ability to disseminate teaching materials, there is the possibility that a creative K-12 teacher may develop a highly successful multi-media course. For example, that teacher may develop a revolutionary, or at least cutting edge, method of teaching via the Internet, utilizing unique course material or even a cartoon character along the

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90 *Id.*
91 *Id.*
92 *Id.*
93 Havriluk, *supra* note 7.
94 Schmid, *supra* note 7. The teachers who have been involved in placing materials on FIRN have as of yet declined to assert any copyright ownership, believing that such material should be considered "shareware." *Id.*
95 Parry, *supra* note 85.

lines of the Public Broadcasting System's Barney, the dinosaur. While the material would nonetheless be copyrighted, unless a policy were articulated beforehand, and an agreement reached, the copyright would vest entirely in the teacher. Although it may be considered remote at present, such a scenario is arguably plausible.

While the Copyright Act's work-for-hire provision might well bolster any claim made by the institution to a significant portion of royalties, it is far from certain that the scenario in question would play out this way. The issue becomes doubly difficult if a teacher pursues the creation of such material on their own time, yet with knowledge acquired on school time.[96]

The DOE Office of the General Counsel has in the past effected copyright arrangements for school districts. Yet, it would seem to strain their resources, if not be simply impracticable, to expect the DOE to handle the potential copyright arrangements of all of the school districts across the state.

E. Related Funding and Policy Issues

The growth and wide-ranging use of distance learning technologies in Florida has raised a number of issues concerning the protection of intellectual property rights. Nearly every distance learning activity leads to questions related to intellectual property.[97] These issues in turn implicate other, broader issues, such as educational funding, and even educational policy as a whole. In much the same manner that distance learning technologies know no school district

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96 Ruberg, *supra* note 87.

97 Board of Regents report, Appendix C, p. 16.

boundaries, these issues cut across the lines of Florida's multi-level educational system, raising thorny public policy and political questions as to coordination and centralization.

Because revenue streams are generated through royalties when a distance learning institution creates and markets course materials, licensing arrangements can directly affect how, by whom, and to what extent distance learning is implemented across the state. Institutions that, with state funds, create and distribute materials such as telecourses out-of-state are currently allowed to dispose of the resulting income as they see fit.[98] Institutions that are deeply involved in distance learning, such as Florida Community College at Jacksonville, reinvest the income in other distance learning projects.[99] This practice may concentrate distance learning efforts in certain state institutions, which were the early adopters. Other institutions which did not initially engage in distance learning instruction may be left further behind. Requiring revenues from distance learning licensing arrangements to enter a common statewide pool could, however, dampen individual initiative and creativity.[100] The revenue stream would then perhaps be reduced over time, and would certainly be less than its full potential.

The proprietary nature of school and community college districts about funding and full-time equivalent head counts (FTEs) also puts a damper on other efforts to implement distance learning on a widely-utilized scale. For example,

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98 Telephone interview with Susan Lehr, Florida Community College at Jacksonville (Aug. 10, 1995) [hereinafter Lehr].

99 *Id.*

100 *Id.*

some community college districts have insisted that their local cable provider remove the channel which provides telecourses from a neighboring community college district because under the current arrangement they lose a potential student as part of their FTE count.[101] Also, the initiative and creativity of some community college faculty who have attempted to teach courses via FIRN (the state education telecommunications network) have been hindered because such courses necessarily transcend district lines.[102] To get around these concerns, Manatee Community College is using FIRN to provide a Written Communications I course, but only to students in their geographic area. In addition to submitting essays via FIRN's e-mail system, students will be required to attend four on-site sessions.

Both the potential for revenue engendered by licensing agreements and the nature of distance learning technology itself, which transcends the geographic and political boundaries of the education system, call for a reassessment of the policies of confining distance learning providers to traditional school and community college districts. Issues such as how to price distance learning courses, how to credit institutions which participate in distance learning with FTE counts, how to devise a new funding formula for distance learning courses, how to equitably share revenues from licensing agreements developed through

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101 Clower, *supra* note 9.

102 Schmid, *supra* note 7. One Manatee Community College professor recently offered to teach English Composition via e-mail over FIRN, publicizing the opportunity over FIRN itself. MCC subsequently issued a disclaimer over FIRN, advising users that the professor was not authorized to make such an offer. *Id.*

state funds, and how to achieve cost-effective means of access to distance learning for all Florida students, remain to be addressed.

In order to better address these concerns, at least at the community college level, the Florida State Board of Community Colleges has recently convened a Technology Task Force. The members of the Task Force include State Board members, community college presidents, and community college personnel. The initial focus of the Task Force is on developing the community college system's technology plan. Specific to this plan will be issues addressing the delivery and funding of distance learning courses and identifying ways to achieve cost-effective means of post secondary access to all Florida residents.[103]

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[103] Memo to Karen Stolting from Denise Potvin, Division of Community Colleges, Nov. 22, 1995.

III. Conclusions and Recommendations

Based on the findings of this report, it is concluded that:

- Although rapidly expanding technologies offer tremendous opportunities to improve teaching and learning and expand access for place and time-bound students, the technologies also aggravate long-standing issues, some related to intellectual property, in education.

- The intellectual property issues related to distance learning are complex, affect some basic assumptions and practices in the education system, and are still unsettled, partly due to the current federal review of the copyright law and its associated "fair use" doctrine. There needs to be an ongoing forum for reviewing these issues and their impact on distance learning in Florida and formulating recommendations to the Legislature.

Therefore, it is recommended that:

1. The Florida Distance Learning Network create a sub-committee devoted to addressing intellectual property issues associated with distance learning. The Board of Regents, the State Board of Community Colleges, and the Division of Public Schools should submit recommendations to the Florida Distance Learning Network to assist the sub-committee in identifying and developing recommendations on all related intellectual property issues, such as effective negotiating and contracting strategies and policies for obtaining statewide licenses of copyrighted materials, and equitable arrangements for copyright interests in materials developed by Florida teachers. The sub-committee should

also be responsible for staying abreast with the ongoing federal review of the copyright law and any proposed changes, and with advising distance learning providers on copyright procedures and licensing arrangements to properly manage the state's distance learning system.

2. The Florida Distance Learning Network create a sub-committee devoted to addressing the funding issues associated with the disposition of revenues resulting from the licensing of distance learning courseware and related products. The Board of Regents, the State Board of Community Colleges, and the Division of Public Schools should submit recommendations to the Florida Distance Learning Network to assist the sub-committee in its formulation of policy in this area.

Based on the findings in this report, it is also concluded that:

- Because there is no standardized policy for intellectual property agreements between teachers and institutions at the K-12 level, the State's financial interests may be at risk.

Therefore, it is recommended that:

3. The Legislature amend the law to expressly grant school districts the same statutory authority as universities and community colleges to effect intellectual property agreements with their teachers and require the school districts to adopt guidelines in this area.

IV. APPENDIX

Appendix A

List of Interviews

Tracy Bailey, Florida Distance Learning Network

Gary Becker, Director of Instructional Media and Technology Services, Seminole County School Board District

Kathy Clower, Director of Telecommunications, Florida Community College of Jacksonville

Wendy Cullar, School Year 2000

Susan Fell, Assistant Director of Distance Learning, Florida State University

Mary Anne Havriluk, Director, Florida Remote Learning Service (FRLS)

Susan Lehr, Legislative Liason, Florida Community College at Jacksonville

Dr. J. Richard Madaus, Director, College Center for Library Automation

Roy McTarnaghan, President, Florida Gulf Coast University

John Opper, Postsecondary Education Planning Commission (PEPC)

James J. Parry, Board of Regents

Denise Potvin, Florida State Board of Community Colleges

Steven Prevaux, Board of Regents

Charles Ruberg, General Counsel's Office, Department of Education

Bill Schmid, Director, Florida Information Resource Network (FIRN)